2011 IL App. (1st) 101636U

FIRST DIVISION
September 30, 2011

No. 1-10-1636

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 73, Petitioner, v. ILLINOIS LABOR RELATIONS BOARD, LOCAL PANEL, and COUNTY OF COOK, Respondents.	)	Petition for Review of An Order of the Illinois Labor Relations Board, Local Panel. ILRB No. L-CA-07-049

JUSTICE HALL delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held:* Labor Board's decision to dismiss the Union's complaint was not clearly erroneous where: (1) the use of the term "discuss" rather than "bargain" and the refusal to concede its duty to bargain did not establish the County's refusal to bargain the change in employee hours with the Union; (2) the Union waived its right to bargain and (3) the Union received adequate notice of the change in hours.

¶ 2 The petitioner, Service Employees International Union, Local 73 (the Union), brings a

direct administrative appeal challenging an order of the respondent, the Illinois Labor Relations Board (the Board). The Board overturned the finding by the administrative law judge (the ALJ) that the respondent, the County of Cook (the County), violated sections 10(a)(1) and 10(a)(4) of the Illinois Public Labor Relations Act (the Act) by making unilateral changes in the hours county employees worked without giving the Union adequate notice and a reasonable opportunity to bargain.[1] See 5 ILCS 315/10(a)(1)(4) (West 2006). The Board then dismissed the Union's complaint.

¶ 3 On appeal, the Union contends that the Board clearly erred in its determinations that the County offered to bargain, and that the Union waived its right to bargain and had adequate notice of the change. We disagree and affirm the decision of the Board. The pertinent evidence is set forth below.

¶ 4 Between late December 2006 and February 1, 2007, a series of letters were exchanged between representatives of the Union and the County concerning a change in the hours worked by the employees of the County's bureau of administration.[2] The contents of the letters are summarized below.

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[1]The Union's complaint also charged the County with violating section 10(a)(1) and (2) of the Act (5 ILCS 315/10(a)(1),(2) (West 2006)), alleging that the County instituted the change in hours in retaliation for the decision by unrepresented employees to seek representation by the Union. The ALJ found no violation, and the Union did not challenge that finding.

[2]This appeal concerns only those employees working in the Department of Animal Control, the Law Library and the Office of the Public Administrator.

¶ 5 On December 29, 2006, Mark Kilgallon, the interim chief officer of the bureau of administration, wrote to Christine Boardman, president of the Union, to inform her that, as of January 8, 2007, "all Bureau of Administration Departments will conduct official business during the hours of 8:30 a.m to 4:30 p.m. If you have any questions or concerns, please contact this office at [phone number] immediately." On January 17, 2007, Ms. Boardman wrote to Mr. Kilgallon, acknowledging receipt of his December 29, 2006, letter and stating that "the Union is requesting to bargain over this matter where it impacts bargaining unit employees which we represent." She requested that Mr. Kilgallon contact Betty Boles, vice-president of the Union, to set a date for a meeting.

¶ 6 On January 22, 2007, at the direction of Mr. Kilgallon, Jonathan Rothstein, special assistant for labor relations, responded to Ms. Boardman's January 17, 2007, letter. Mr. Rothstein stated that the County would schedule a meeting to discuss the hours of work for the employees but in doing so, the County did not concede that it had "a duty to bargain over the impact of our policy on this matter, as suggested in you[r] letter of January 17, 2007." Also on January 22, 2007, Ms. Boardman wrote to Mr. Kilgallon to clarify her January 17, 2007, letter. She pointed out that an employer was prohibited by law from making any unilateral changes in the terms and conditions of employment. The Union was therefore requesting "a return to the status quo ante ***until such time as an agreement is reached ***. Please advise as to whether the County shall return the hours to its prior practice and procedure. If the County chooses not to do this, we shall have no alternative but to file for the appropriate remedies with the Labor Board."

¶ 7 On January 30, 2007, Ms. Boles wrote to Mr. Rothstein requesting that he contact her to schedule a date and time for a meeting between the County and the Union. The Union filed an unfair labor practice charge against the County on that same day.

¶ 8 On February 1, 2007, Mr. Rothstein wrote to Ms. Boardman and Ms. Boles in response to Ms. Boardman's January 22, 2007, letter and Ms. Boles' January 30, 2007, letter. In answer to the request for a meeting, Mr. Rothstein proposed dates of February 9 or February 14, 2007, for a meeting. He then addressed Ms. Boardman's January 22, 2007, letter as follows:

> "[I]n regards to Ms. Boardman's letter written to 'clarify' your request to bargain over the change in work hours, notwithstanding our prior notice to you and the fact that we provided you with an opportunity to discuss this matter, you have elected to file an unfair labor practice charge that inaccurately states the course of events. I will not respond further to your letter as this is a matter now in litigation, except to note that we disagree with the facts as you have presented them and the conclusions stated, both legal and otherwise."

Mr. Rothstein concluded by stating that the County remained available to discuss the matter with the Union.

¶ 9 On April 29, 2008, a hearing on the charge was held before ALJ Sharon B. Wells. Prior to the hearing, the parties stipulated that "[t]he majority of the departments within the Bureau of Administration have worked a 7 ½-hour day for at least 10 years" and that "[w]hen the [County] implemented the change in working hours *** employees were required to work [an] 8-hour day, and their pay remained the same as when they worked a 7 ½-hour day." The following

testimony was presented at the hearing.[3]

¶ 10 Mark Dickman, a law librarian, testified that he had worked for the County for 20 years. His hours were 9 a.m. to 4:30 p.m., with two 20-minute breaks. In January 2007, his hours were changed to 9 a.m. to 5 p.m.

¶ 11 Vincent Salamone testified that he began working for the highway department in 1956. When he first began working for the County, his hours were 9 a.m. to 5 p.m. with two 15-minute breaks. Later, his hours changed to 9 a.m. to 4:30 p.m.; in exchange, the employees relinquished their two breaks. On February 5, 2007, Mr. Salamone's hours were changed to 8:30 a.m. to 4:30 p.m., but the breaks were not reinstated.

¶ 12 Ms. Boles, vice-president of the Union, testified that December 29, 2006, was a Friday. Since the Union offices were closed on January 1 and 2, 2007, in observance of the holidays, mail was not delivered to the Union offices until January 3, 2007.

¶ 13 Ms. Boles testified that she received a copy of the January 22, 2007, letter from Mr. Rothstein to Ms. Boardman. While Mr. Rothstein stated that the County was willing to meet to discuss the hours issue, his statement that the County did not concede that it had a duty to bargain the issue led her to conclude that the meeting would be limited to discussing rather than bargaining over the change in hours. In light of Mr. Rothstein's reference to the Union's filing of an unfair labor practice charge against the County in his February 1, 2007, letter, Ms. Boles was of the opinion that the County felt there was no need to bargain with the Union.

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[3]We have not set forth the evidence pertaining to the retaliation charge as that is not at issue in this appeal.

¶ 14 On cross-examination, Ms. Boles testified that she did not know when Mr. Kilgallon's December 29, 2007, letter was delivered to the Union offices but acknowledged that it could have been delivered on January 3, 2007. Ms. Boles believed that she might have been on vacation the first week in January 2007; she did not know Ms. Boardman's whereabouts. Ms. Boles believed that the change in the employee hours went into effect near the end of January 2007 and the early part of February 2007.

¶ 15 Mark Kilgallon testified that he was appointed interim chief of the administration bureau on December 19, 2006. After learning that some of his departments operated under a 7 ½-hour work day, he drafted his December 29, 2007 letter. After reviewing the letter with Mr. Rothstein, then acting director of human resources, he sent it to Ms. Boardman. The purpose of the change was to reflect the County's payroll system, under which employees were paid for an eight-hour day, with an hour for lunch. The change would insure that the taxpayers would get eight hours of work from the employees for eight hours of pay. By giving the Union 10 days notice of the change, the letter was intended to afford the unions impacted by the change in hours an opportunity to meet with the County. Otherwise, the letter would only have gone to the various departments, informing them that the change in hours was effective immediately.

¶ 16 According to Mr. Kilgallon, he remained open to suggestions from the Union as far as the proposed changes to the hours were concerned. As an example, having some employees work an 8:30 a.m. to 4:30 p.m. schedule and others a 9 a.m. to 5 p.m. schedule would allow the County's offices to be open longer to serve the public.

¶ 17 On cross-examination, Mr. Kilgallon acknowledged that his December 29, 2006, letter to

the Union could have been delayed in the mail due to the holidays. The implementation of the new hours began in January 2007 but was not completed by the target date due to the difficulties various departments experienced in implementing change in hours. When questioned as to whether he intended to bargain over the change or merely discuss it, Mr. Kilgallon explained that he relied on Mr. Rothstein's advice, which was to inform the Union, allow it time to respond and "go from there." He then testified as follows:

> "So I didn't have any - - I didn't have any preconceived notions of how this was going to eventually play out. I knew it was important from the County's perspective to make sure that people that are getting paid eight hours a day, that they should work eight hours a day. But I don't have an answer to your question. It wasn't a yes or no or one or the other."

¶ 18 When questioned as to whether he was going to bargain, Mr. Kilgallon responded that "if the union called me up, I was going to sit down with the union and discuss the matter." Asked to clarify whether it would be to discuss or bargain with the Union, he responded that he would "rely on human resources to make the decision if we planned on bargaining with the union or discussing it with the union." He disagreed with the Union's interpretation of Mr. Rothstein's statement that the County had no duty to bargain over the change in the employee hours. If he was contacted about a negotiating issue by the Union, he would refer the matter to Mr. Rothstein. Finally, Mr. Kilgallon acknowledged that, in changing the employee work hours, he did not take into consideration that some departments, such as Mr. Salamone's, worked a full eight hours by not taking their breaks.

¶ 19 ALJ Wells found that the County violated section 10(a)(4) of the Act when it changed the work hours of its employees without bargaining with the Union . The ALJ noted that section 7 of the Act required that the parties bargain with respect to employee wages, hours and other conditions of employment. 5 ILCS 315/7 (West 2006). The ALJ found that, even though Mr. Rothstein offered to set up a meeting, his statement that the County did not have a duty to bargain the impact of the change in hours indicated that the change in hours was an accomplished fact. Therefore, the Union did not waive its right to bargain by failing to meet with the County.

¶ 20 The ALJ also determined that the Union did not waive its right to bargain by waiting until January 17, 2007, to demand bargaining. The ALJ found that the County's notice to Ms. Boardman did not give the Union sufficient time in advance of the implementation of the change in hours to allow for a reasonable opportunity to bargain, and that the County was only willing to discuss the scheduling of the work day, not the 30-minute increase in the work day.

¶ 21 The County filed exceptions to the ALJ's recommended decision and order. The Board reversed the ALJ's finding of a violation and dismissed the complaint.

¶ 22 The Board agreed with the County that the Union had waived its right to bargain over the change in hours by not demanding bargaining in a timely fashion. The Board found that on several occasions, the County had offered to discuss the proposed changes in hours, but the Union refused because the County reserved its right to contest that it was required to bargain the hours issue with the Union. The Board determined that nothing in the County's response to the Union indicated that it was unwilling to fully discuss and attempt to resolve the matter. In the absence of a meeting, the Board was unable to determine if the County would have bargained in

good faith.

¶ 23 This timely appeal followed.

ANALYSIS

I. Standard of Review

¶ 24 Review of an agency's decision extends to all issues of law and fact presented by the record. *SPEED District 802 v. Warning*, 242 Ill. 2d 92, 111 (2011). We apply the *de novo* standard of review to an agency's findings on questions of law. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). An agency's findings of fact must be upheld unless they are against the manifest weight of the evidence. *Chicago Park District v. Illinois Labor Relations Board,* 354 Ill. App. 3d 595, 608 (2004).

¶ 25 A decision of the Illinois Labor Relations Board presents a mixed question of fact and law; therefore, the court applies the clearly erroneous standard when reviewing the board's decision. *SPEED District 802,* 242 Ill. 2d at 112. We will reverse an agency's decision only if, after our review of the entire record, we are firmly convinced that a mistake has been committed. While highly deferential, this standard does not require a reviewing court to give blind deference to the board's decision. *SPEED District 802,* 242 Ill. 2d at 112.

II. Discussion

A. *Offer to Bargain*

¶ 26 The Union contends that the County had no intention of bargaining the hours issue based on the County's use of the term "discuss," rather than "bargain," and the County's refusal to concede its duty to bargain with the Union over the hours issue. The Union maintains that the

County's offer was no more than "surface bargaining."

¶ 27 The Act required the County and the Union to engage in good-faith bargaining. 5 ILCS 315/10(a)(4) (West 2006). Bargaining does not mean a formal meeting where each side maintains a "take -it -or- leave- it" attitude; good-faith bargaining presupposes an open mind and a sincere desire to reach an ultimate agreement. *Service Employees International Union, Local 73 v. Illinois Educational Labor Relations Board*, 153 Ill. App. 3d 744, 751 (1987). When an employer has a duty to bargain, it is only required to provide notice of its willingness to bargain prior to the time its plans are fixed. *Service Employees International Union, Local 73*, 153 Ill. App. 3d at 755. We note, however, that whether the County had the duty to bargain the change in employee hours with the Union is not at issue in this case.

¶ 28 In this case, the fact that the correspondence from the County used the term "discuss" rather than "bargain' does not, in and of itself, establish that the change in hours was an accomplished fact at the time the County offered to meet with the Union. In *Village of Homewood*, 7 PERI ¶2022 (ISLRB 1991), the Village's discussions with the union did not constitute good-faith bargaining where the Village's decision not to compensate union members for attending meetings was implemented prior to its offer to negotiate the issue, and the Village initially refused the request for compensation rather than discuss it with the union. In that case, there was no effort to distinguish between the terms "discussions" and "bargaining" except in so far as determining whether the element of good-faith was present.

¶ 29 It was undisputed that, prior to the implementation of the change in hours, Mr. Kilgallon sent a notice of the change to the Union and requested that the Union contact the County

immediately if it had questions or concerns about the change. Mr. Kilgallon testified that he intended to discuss the hours issue with the Union; otherwise, he would have notified only the department heads of the change in the employee hours. Instead, he gave the Union time to respond prior to the implementation of the change. While the only adjustment to the employee hours Mr. Kilgallon was prepared to discuss was the alternative schedules, he also testified that "he had no preconceived notions" as to how the hours issue would be resolved and that the plan was to inform the Union, allow it time to respond and "go from there."

¶ 30 The Union's reliance on *Georgetown-Ridge Farm Community Unit School District No. 4 v. Illinois Educational Labor Relations Board*, 239 Ill. App. 3d 428 (1992) is misplaced. In that case, the reviewing court rejected the district's argument that discussions during public school board hearings could be considered collective bargaining. However, the case does not stand for the proposition that discussions between an employer and the employee representative can never be good-faith bargaining sessions. The reviewing court rejected the district's argument that informing the general public and the association of its financial problems through these meetings constituted collective bargaining negotiations. See *Georgetown-Ridge Farm Community Unit School District No.*, 239 Ill. App. 3d at 460. In addition, the discussions at the school board meetings did not serve as bargaining sessions due to the presence of third parties with no stake in the outcome. *Georgetown-Ridge Farm Community Unit School District No.*, 239 Ill. App. 3d at 461.

¶ 31 The use of the term "discuss" did not establish that the County would not engage in bargaining with the Union once the parties met. Since the Union refused to meet with the

County, there is no evidence as to whether the meetings between the parties would have been good-faith bargaining sessions over the hours issue or discussions for informational purposes only. The Board acknowledged the lack of this evidence by noting in its decision that, in the absence of a meeting, it could not determine whether good-faith bargaining would have taken place. Therefore, the evidence failed to establish that the County's offer to meet and discuss the hours issue was anything less than an opportunity to engage in good-faith bargaining.

¶ 32 *Chicago Transit Authority v. Amalgamated Transit Union, Local 241*, 299 Ill. App. 3d 934 (1998), relied on by the Union, is distinguishable. There, the reviewing court determined that a letter announcing a job re-classification did not constitute an invitation to bargain over the effects of the re-classification. While the letter stated that the CTA would address questions, the re-classification was presented as a *fait accompli*. *Chicago Transit Authority*, 299 Ill. App. 3d at 944. In contrast, here, the evidence established that the change in employee hours was not presented to the Union as an accomplished fact. In his testimony, Mr. Kilgallon explained that, had he simply intended to implement the change in hours, he would not have sent his December 29, 2006, letter to the Union. Instead, the letter was sent with the intent to give notice of and to allow the Union time to respond to the change in hours prior to the implementation of the change. He further testified that he remained open to suggestions from the Union and that he had no preconceived ideas as to the result of discussions between the parties over the change in hours. The change in employee hours was not a *fait accompli* in this case.

¶ 33 The Union then argues that the County's refusal to concede that it had a duty to bargain the hours issue evidenced that its offers to meet with the Union would only have resulted in

"surface bargaining." Surface bargaining occurs when the employer's actions appear to be good-faith collective bargaining but where the employer is only going through the motions of bargaining. See *American Federation of State, County & Municipal Employees, Council 31, AFL-CIO v. Illinois State Labor Relations Board*, 187 Ill. App. 3d 585, 590 (1989). The mere refusal to concede its duty to bargain did not establish that the County intended to engage in anything less than good-faith bargaining. See *Georgetown-Ridge Farm Community Unit School District No. 4*, 239 Ill. App. 3d at 459 (the reviewing court's determination that the school district did not engage in bargaining was not based on the district's refusal to concede its duty to bargain).

B. *Waiver of Right to Bargain*

¶ 34 The Union contends that it did not waive its right to bargain by failing to accept the County's offer to discuss the change in employee hours. The Union argues that it promptly relayed its request to bargain to the County. The evidence established that the Union did not respond to Mr. Kilgallon until January 17, 2007, more than two weeks after his December 29, 2007, letter was sent and more than a week after the date the new hours were scheduled to be implemented.

¶ 35 Other than establishing that the December 29, 2007, letter was sent over a holiday period, the Union presented little factual evidence that it could not have responded to the letter prior to January 8, 2007, the date of the implementation of the change in hours or prior to January 17, 2007. Ms. Boles testified that she did not know the date the December 29, 2006, letter was received in the Union offices and acknowledged that it could have been received as early as

January 3, 2007, when the Union offices reopened after the holiday. Ms. Boles thought she might have been on vacation the balance of that week but could offer no explanation as to Ms. Boardman's whereabouts. Ms. Boardman did not testify. The Union's evidence failed to establish that delivery of the December 29, 2007, letter, was actually delayed or provide any other reason to explain the delay in responding to the notice of the change in employee hours.

C. *Adequacy of the Notice*

¶ 36 The Union contends that the County gave the Union inadequate notice of the change in employee rules in that 10-days notice did not provide a reasonable opportunity to engage in bargaining prior to implementation of the change. The Union points out that the notice period was in reality shorter than 10 days because Mr. Kilgallon's December 29, 2006, letter was sent to the Union over a holiday period, during which mail delivery was acknowledged to be slower, the Union offices were closed, and people were on vacation. Therefore, the earliest the Union could have received the December 29, 2006, letter was January 3, 2007, when the Union offices reopened, leaving only 3 business days to bargain over the change.

¶ 37 The Union relies on *County of Jefferson*, 10 PERI ¶2035 (ISLRB 1994), where the Board held that eight days was inadequate notice. We find *County of Jefferson* distinguishable. In that case, on November 23, 1993, the county representative presented AFSCME with a proposal for a change to the county employees' insurance plan. However, the proposal contained inaccurate coverage information. AFSCME was required to respond to the proposal before December 1, 1993, the date the new insurance would be implemented. AFSCME informed the county representative that it needed time to study the proposal and to discuss it with its members. At the

December 9, 1993, bargaining session, AFSCME was given the correct information about the new plan. When it attempted to discuss the differences between the proposal and the prior insurance coverage, the county representative informed AFSCME that it had to accept the insurance change because the county could no longer afford the premiums of the old policy. From then on, the county continued to reject AFSCME's attempts to bargain the issue.

¶ 38 Based on the evidence, the Board found that the November 23, 1993, notice was neither adequate nor sufficient to give AFSCME time to bargain about changing the health insurance plans. It found that the county had failed to give AFSCME accurate information about the plan and then enrolled its employees in the plan before AFSCME had even replied to the proposal. The Board further found that the county's response to AFSCME was one of "take it or leave it."

¶ 39 Unlike *County of Jefferson*, the Union did not respond to the County's notice of the change in hours until after the change took effect. The Union did not call Ms. Boardman to testify, and her January 17, 2007, letter, did not provide an explanation for the delay. Unlike *County of Jefferson*, in the present case, there was no request for information or time to study the change in hours issue until after the implementation of the hours change was underway. Unlike *County of Jefferson*, the evidence did not establish that the County adopted a "take it or leave it" attitude. According to Mr. Rothstein's February 1, 2007, letter, the County remained willing to meet even after the Union filed the unfair labor charge. Ms. Boles opined that the County never intended to bargain because it refused to concede its duty to do so. However, we have already determined that the refusal to concede the duty to bargain did not establish the intention not to bargain in good faith.

CONCLUSION

¶ 40 We conclude the Board's determinations that the County offered to bargain over the change in employee hours, that the Union waived its right to bargain over the change and that the Union received adequate notice of the change were not clearly erroneous. Therefore, we affirm the Board's decision dismissing the Union's complaint.

¶ 41 Affirmed.